U.S. Department of Labor **Office of Administrative Law Judges**
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Date Issued: October 26, 2000
Case No. 2000-BLA-467

In the Matter of
WILLIAM H. BENTLEY,
Claimant,

v.

TORIE MINING INC.,
Respondent,

and

AMERICAN INTERNATIONAL SOUTH,
Carrier,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest.

APPEARANCES:[1]
William Roberts, Esq.
Pikeville, Kentucky
For the Claimant.

Lois Kitts, Esq.
Pikeville, Kentucky
For the Respondent.

BEFORE: HON. THOMAS F. PHALEN, JR.
Administrative Law Judge

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[1]The Director, Office of Workers' Compensation Programs, was not present or represented at the hearing.

DECISION AND ORDER AWARDING BENEFITS

This is a decision and order arising out of a claim for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1977, 30 U.S.C. §§ 901-962, (hereinafter referred to as "the Act") and the regulations thereunder, located in Title 20 of the Code of Federal Regulations. Regulation section numbers mentioned in this Decision and Order refer to sections of that Title.

On February 14, 2000, this case was referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Programs, for a hearing. (DX 39).[2] A formal hearing on this matter was conducted on August 22, 2000, in Pikeville, Kentucky by the undersigned Administrative Law Judge. All parties were afforded the opportunity to call and to examine and cross examine witnesses, and to present evidence, as provided in the Act and the above referenced regulations.

ISSUES

The issues in this case are:

1. Whether the Miner has pneumoconiosis as defined by the Act;

2. Whether the Miner's pneumoconiosis arose out of coal mine employment;

3. Whether the Miner is totally disabled; and

4. Whether the Miner's disability is due to pneumoconiosis.

(DX 39).

Based upon a thorough analysis of the entire record in this case, with due consideration accorded to the arguments of the parties, applicable statutory provisions, regulations, and relevant case law, I hereby make the following:

FINDINGS OF FACT

Procedural History:

[2]In this Decision, "DX" refers to the Director's Exhibits, "EX" refers to the Employer's Exhibits, "CX" refers to the Claimant's Exhibits, and "Tr" refers to the official transcript of this proceeding.

William H. Bentley ("Mr. Bentley" or "Claimant") filed his application for Black Lung benefits on June 29, 1998. (DX 1). On July 8, 1998, Torie Mining, Inc. ("Respondent" or "Employer") was identified as the Responsible Operator with American International South as its carrier. (DX 17). The District Director denied benefits in a Proposed Decision and Order Memorandum of Conference issued on November 1, 1999. (DX 35). The Claimant, on November 11, 1999, requested a formal hearing and the case was transferred to the Office of Administrative Law Judges on February 14, 2000. (DX 37, 39). The undersigned presided over the hearing in Pikeville, Kentucky on August 22, 2000.

Background:

Mr. Bentley was born on February 16, 1946, and was 54 years old at the time of the hearing. (DX 1). He completed school through the sixth grade. (DX 1). He has been married to Inez Johnson for thirty-six years. (DX 1). Mrs. Bentley is a dependent. (DX 1; Tr 15, 18).

Mr. Bentley began working in the coal mines around the age of seventeen and continued to work in them for approximately thirty-five years. During his thirty-five years of coal mining, all of the work he did was performed underground. (Tr 9). He performed underground coal mining work as an electrician, a cutting machine operator, a mine operator, a roof bolter operator, and making belt moves. According to Mr. Bentley, he did just about anything and everything in underground coal mining. He also stated that his job involved heavy labor approximately three a week. That heavy labor included bending, lifting, stooping, pushing and pulling. (Tr. 10). He would have to lift up to 100 pounds depending upon the job he was performing. (DX 4). He stopped working in the mines on May 10, 1998, due to his breathing and back problems. (Tr 11).

Dr. Ira Potter is Mr. Bentley's treating physician. (DX 34; Tr 12). Mr. Bentley is taking medication for his breathing problems. His medications include Verapmil, Allegra, Servent Inhaler, Rhinocort, and Serzone. (CX 1).

Smoking History:

Mr. Bentley was a non-smoker at the time of the hearing; he quit smoking in January 1999. (DX 33; Tr 12, 13). He estimated that he had smoked for approximately fifteen years. (Tr 13). When Dr. Potter examined the Claimant on August 4, 1999, he noted a smoking history of approximately one-half pack per day for eighteen years, as well as that the Claimant had stopped smoking in January 1999. (DX 33). However, when Dr. Potter examined the Claimant on July 5, 2000, he did note a one-half pack per day smoking history commencing at age seventeen and ending at age fifty-three. (CX 1). Dr. Broudy noted a twenty-five to thirty year smoking history of about one pack per day but cut to one-half pack per day for the last three years. (DX 25). Dr. Baker noted a twenty-eight year smoking history of one-half pack per day. (DX 24). Dr. Younes noted that the Claimant began

smoking around age seventeen and smoked one-half pack per day. (DX 11). Based upon a review of the different records regarding the Claimant's smoking history, I find that he smoked one-half pack of cigarettes per day from age seventeen to age fifty-three. This translates to a thirty-six half pack per day or eighteen year pack per day smoking history.

Responsible Operator:

Torie Mining, Inc. is the employer with whom Mr. Bentley spent his last cumulative one year period of coal mine employment and is properly designated as the responsible operator in this case. (§ 725.493(a)(1); DX17).

Length of Coal Mine Employment:

Mr. Bentley was a coal miner within the meaning of § 402(d) of the Act and § 725.202 of the regulations. The parties stipulated that he had at least 32 years of qualifying coal mine employment. (DX 39, Tr 17).

Dependents:

Mr. Bentley has one dependent for purposes of augmentation of benefits awarded under the Act and the Regulations, his wife, Inez Bentley. (DX 1).

MEDICAL EVIDENCE

X-ray reports:

Exhibit	Date of X-ray	Date of Reading	Physician/ Qualifications	Interpretation
DX 28	4-26-74	6-19-74	NIOSH Kattan B-reader[3]	negative
DX 28	7-13-77	7-13-77	NIOSH Combs B-reader	negative

[3]A "B" reader is a physician who has demonstrated proficiency in assessing and classifying x-ray evidence of pneumoconiosis by successful completion of an examination conducted by or on behalf of the Department of Health and Human Services. This is a matter of public record at HHS National Institute for Occupational Safety and Health reviewing facility at Morgantown, West Virginia. (42 C.F.R. § 37.5l) Consequently, greater weight is given to a diagnosis by a "B" Reader. *See Blackburn v. Director, OWCP*, 2 B.L.R. 1-153 (1979).

Exhibit	Date of X-ray	Date of Reading	Physician/ Qualifications	Interpretation
DX 28	7-26-79	7-26-79	NIOSH Navani B-reader	negative
DX 28	10-1-80	10-9-80	NIOSH Morgan B-reader	negative
DX 28	6-8-81	illegible	NIOSH Harrison B-reader	negative
DX 12	6-26-98	7-1-98	Baker B-reader	1/0
DX 14	6-26-98	9-22-98	Sargent B-reader, BCR[4]	negative
DX 11	7-15-98	7-15-98	Younes B-reader	1/1
DX 11	7-15-98	7-31-98	Sargent B-reader, BCR	negative
DX 11	7-15-98	8-19-98	Barrett B-reader, BCR	negative
DX 24	11-18-98	11-18-98	Baker B-reader	1/0
DX 26	11-18-98	1-18-99	Mathur B-reader, BCR	1/1
DX 25	12-22-98	12-22-98	Broudy B-reader	negative

[4]A physician who has been certified in radiology or diagnostic roentgenology by the American Board of Radiology, Inc., or the American Osteopathic Association. *See* 20 C.F.R. § 727.206(b)(2)(III). The qualifications of physicians are a matter of public record at the National Institute of Occupational Safety and Health reviewing facility at Morgantown, West Virginia.

EX 1	8-4-99	8-1-00	Fino B-reader	negative
DX 33	8-4-99	8-4-99	Potter	1/2
DX 36	8-4-99	10-19-99	Mathur B-reader, BCR	1/1
CX 1	7-5-00	7-6-00	Potter	1/2
EX 3	7-5-00	9-14-00	Fino B-reader	negative
CX 2	7-15-00	8-5-00	Mathur B-reader, BCR	1/1

Pulmonary Function Studies:

Exhibit/ Date	**Physician**	**Age/ Height**	**FEV_1**	**FVC**	**MVV**	**FEV_1/ FVC**	**Tracings**	**Comments/ Qualifying**
DX 11 7-18-98	Younes	52/ 67 1/4"	2.43 3.01*	4.57 4.97*	94		Yes	Good effort and cooperation; non-qualifying
DX 24 11-18-98	Baker	52/67"	2.21	4.16			Yes	non-qualifying
DX 25 12-22-98	Broudy	52/68"	2.42 2.82*	4.55 5.21*	83 89*	53% 54%	Yes	Good effort; non-qualifying
DX 33 8-4-99	Potter	53/68"	2.59 2.90*	4.22 4.67*			Yes	Good effort and cooperation; non-qualifying
CX 1 7-24-00	Potter	54/68"	2.33 2.63*	3.89 4.54*			Yes	Good effort and cooperation; non-qualifying

*post-bronchodilator values

Arterial Blood Gas Studies:

Exhibit	Date	pCO_2	pO_2	Qualifying
DX 11	7-15-98	36	77.6	No
DX 24	11-18-98	38	88.3	No
DX 25	12-22-98	38	77.8	No
		31*	104.8*	No

*Results obtained with exercise.

Narrative Medical Evidence:

Dr. Maan Younes, who is board-certified in internal medicine and pulmonary disease[5], examined Mr. Bentley on July 15, 1998. He noted 35 years of coal mine employment and a smoking history of one-half pack per day since age seventeen. An arterial blood gas study, as well as an EKG, yielded normal results. A chest x-ray revealed pneumoconiosis, category 1/1. A pulmonary function study revealed severe obstructive impairment. Review of the CM-988 medical evaluations forms of Dr. Younes reveal several statements that conclude that Mr. Bentley has pneumoconiosis. Section D6 of the form requires the physician to provide the cardiopulmonary diagnosis and the basis for that diagnosis, to which Dr. Younes wrote:

> DX #1 coal workers' pneumoconiosis (CXR)
> DX #2 chronic obstructive pulmonary disease (spirometry)

Section D7 requires the physician to provide the etiology of the cardiopulmonary diagnosis, to which Dr. Younes wrote:

> DX #1 primary etiology: occupational dust exposure
> DX #2 primary etiology: cigarette smoking
> secondary: occupational dust exposure

Section D8(a&b) require the physician to provide the (a) degree of severity of the impairment and (b) the extent to which each of the diagnoses in D6 contributes to the impairment. In response to these, Dr. Younes wrote:

[5]The credentials of Dr. Younes were not included in the record; therefore, I am taking official notice of them as listed with the American Board of Medical Specialties (ABMS) and the American Board of Internal Medicine (ABIM). *See Maddaleni v. The Pittsburgh & Midway Coal Mining Co.*, 14 B.L.R. 1-135 (1990)(where the Board approved the practice of taking official notice of physicians' credentials).

(a) severe obstructive ventilatory impairment which may interfere with last coal mining job.
(b) DX #1 and #2 caused the impairment

Finally, in response to the question of whether or not Claimant should be referred to another physician, Dr. Younes checked the "no" box. There is also an additional sheet attached to the CM-988 form. Within this attachment, Dr. Younes make additional statements as to Claimant's diagnosis. In response to the question "does the coal miner have an occupational lung disease which was related to his coal mine employment," Dr. Younes responds by checking the "yes" box and writing "CXR," i.e., chest x-ray, as the basis for his diagnosis. Dr. Younes also checks a box that categorizes Claimant's impairment as a "severe impairment." Then, in response to the question "is such impairment related to pneumoconiosis or does it have another etiology," Dr. Younes wrote, "impairment is caused primarily by cigarette smoking - occupational dust exposure may be a contributing factor." Finally, in response to the question "does the miner have the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment," Dr. Younes checked the "no" box and then wrote "secondary to severe impairment" as his rationale.

He does not believe that Mr. Bentley has the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment. (DX 11).

Dr. Glen Baker, who is board-certified in internal medicine and pulmonary disease, examined Mr. Bentley on November 18, 1998. Dr. Baker noted the Claimant's work history of thirty-five years in underground mine work, and his smoking history of twenty-eight years at the rate of one-half pack per day. Upon physical examination, Dr. Baker noted bilateral inspiratory and expiratory wheezes in the lungs. Based on the pulmonary function study, Dr. Baker diagnosed Claimant with chronic obstructive airway disease with mild obstructive ventilatory defect. An arterial blood gas was within normal limits. Based on a chest x-ray, Dr. Baker diagnosed Claimant with coal workers' pneumoconiosis, category 1/0. After referring to the *Guides to the Evaluation of Permanent Impairment* (4th Edition), Dr. Baker concluded that with the physiological impairment of obstructive airway disease that the Claimant has and the evidence of pneumoconiosis on his x-ray, he is 100% occupationally disabled from working in the mines and similar dusty occupations. Dr. Baker believes that Claimant's pneumoconiosis is the result of coal dust exposure because he had an abnormal x-ray with a significant history of dust exposure with no other condition to account for his x-ray changes. Dr. Baker noted that Claimant has a long history of smoking as well as dust exposure and both conditions are known causes of obstructive airway disease. "It is thought that any pulmonary impairment is caused in part by his coal dust exposure as well as his cigarette smoking history." (DX 24).

Dr. Bruce Broudy, who is board-certified in internal medicine and pulmonary disease, examined Mr. Bentley on December 22, 1998. Dr. Broudy noted an occupational history of approximately thirty-five years in underground coal mine employment. He also noted that the Claimant had smoked one pack of cigarettes per day for approximately twenty-five to thirty years, the last three

years of which he had cut down to one-half pack per day. Claimant's current symptoms and medications were also discussed. An examination of the chest revealed inspiratory and expiratory wheezes and rhonchi with expiratory delay throughout. The pulmonary function study revealed evidence of mild to moderate obstruction with significant responsiveness to bronchodilation. The arterial blood gas study showed slight resting arterial hypoxemia with elevation of the carboxyhemoglobin indicating continued exposure to smoke. The chest x-rays revealed several scattered calcifications in either lung, as well as some post-inflammatory fibrotic type change in the right mid zone. They also revealed a slight degree of interstitial change categorized as 0/1, q/t in the right mid and upper zone. Dr. Broudy stated that the profusion of opacities was not sufficient to be diagnostic of coal workers' pneumoconiosis. He diagnosed Mr. Bentley with mild to moderate chronic obstructive airways disease, which he believes is the result of cigarette smoking. He also stated that he believes Mr. Bentley retains the capacity to perform the work of an underground coal miner or to do similarly arduous manual labor. (DX 25).

Dr. Ira Potter is Mr. Bentley's treating physician and he issued reports on August 4, 1999, and on July 5, 2000. (DX 33; CX 1). He has been treating Mr. Bentley for his respiratory condition. (DX 34, Tr 12). The Claimant's occupational history included thirty-five and one-half years of coal mine employment, all of which was underground. Dr. Potter noted that Mr. Bentley began smoking around the age of seventeen and smoked approximately one-half pack of cigarettes per day. However, Mr. Bentley quit smoking in January 1999. Mr. Bentley was complaining of shortness of breath, difficulty breathing, dizziness, fatigue, sputum, and difficulty working, walking and doing household chores. On both occasions that Dr. Potter examined Mr. Bentley, he took x-rays that were positive for pneumoconiosis. The x-rays revealed chronic diffuse interstitial changes, some mild hyperinflation and aortic sclerosis. The pulmonary function study conducted on July 5, 2000, revealed obstructive lung disease. The pulmonary function study performed on August 4, 1999, revealed a very mild restrictive ventilatory defect with a moderate superimposed obstructive lung disease, which is partially reversible with bronchodilators. Dr. Potter diagnosed Mr. Bentley with CWP due to coal and rock dust exposure. Dr. Potter also noted that the Claimant is not physically able to perform the work of a coal miner. He went so far as to note that Mr. Bentley is impaired from any type of physical labor; he would only be capable of performing very sedentary jobs. He categorized Mr. Bentley's impairment as moderate. Finally, Dr. Potter noted that Mr. Bentley's pulmonary impairment is related to his CWP. (DX 33; CX 1).

Dr. Gregory J. Fino, who is board-certified in internal medicine and pulmonary disease, reviewed the medical records and issued reports on July 31 and September 14, 2000. Based on chest x-rays and pulmonary function studies, he concluded that the Claimant did not suffer from an occupationally acquired pulmonary condition as a result of coal mine dust exposure. According to Dr. Fino, the obstructive abnormality from which the Claimant suffers was caused by smoking and is not sufficient to disable Claimant. Dr. Fino also noted that even if he was to assume CWP was present, it was not a contributing factor of any discernible consequence in the Claimant's mild, reversible respiratory impairment. (EX 2, 3).

DISCUSSION

Applicable Law:

Mr. Bentley's claim was made after March 31, 1980, the effective date of Part 718, and must therefore be adjudicated under those regulations. To establish entitlement to benefits under Part 718, Claimant must establish, by a preponderance of the evidence, the following elements:

1. That he suffers from pneumoconiosis;

2. That the pneumoconiosis arose, at least in part, out of coal mine employment;

3. That the claimant is totally disabled; and

4. That the total disability is caused by pneumoconiosis.

See §§ 719.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore*, 9 B.L.R. 1-4, 1-5 (1986); *Roberts v. Bethlehem Mines Corp.*, 8 B.L.R. 1-211, 1-212 (1985). Failure to establish any of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 B.L.R. 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 B.L.R. 1-26, 1-27 (1987).

Pneumoconiosis:

In establishing entitlement to benefits, Claimant must initially prove the existence of pneumoconiosis under § 718.202. Claimant has the burden of proving the existence of pneumoconiosis, as well as every element of entitlement, by a preponderance of the evidence. *See Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994). Pneumoconiosis is defined by the regulations:

> For the purpose of the Act, "pneumoconiosis" means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes, but is not limited to coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, progressive massive fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment. For purposes of this definition, a disease "arising out of coal mine employment" includes any chronic pulmonary disease resulting in respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.

Section 718.202.

Section 718.202(a) sets forth four methods for determining the existence of pneumoconiosis.

(1) Under § 718.202(a)(1), a finding that pneumoconiosis exists may be based upon x-ray evidence.

The record consists of twelve x-rays and nineteen interpretations. Five of those x-rays were taken in 1981 and earlier and were interpreted as negative for pneumoconiosis by "B" readers. Those x-rays are separated from the most recent x-rays by seventeen-plus years. Pneumoconiosis is a progressive and irreversible disease. Thus, it is appropriate to accord greater weight to the most recent evidence of record especially where a significant amount of time separates the newer from the older evidence. *Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989)(*en banc*); *Casella v. Kaiser Steel Corp.*, 9 B.L.R. 1-131(1986). Therefore, I give the x-rays conducted by NIOSH from 1974 to 1981 little weight in the determination of whether or not the Claimant currently has pneumoconiosis.

Drs. Baker and Sargent interpreted the 6-26-98 x-ray. Dr. Baker found the x-ray to be positive for pneumoconiosis, but Dr. Sargent found it negative for pneumoconiosis. Dr. Baker is a "B" reader, however, Dr. Sargent is dually qualified, i.e., both a "B" reader and a board-certified radiologist. Greater weight may be accorded the x-ray interpretation of a dually-qualified physician over that of a B-reader. *Sheckler v. Clinchfield Coal Co.*, 7 B.L.R. 1-128 (1984). *See also Roberts v. Bethlehem Mines Corp.*, 8 B.L.R. 1-211 (1985) (weighing evidence under Part 718). I thus accord more weight to Dr. Sargent's interpretation and find the 6-26-98 film is insufficient in and of itself to conclude that the Claimant has pneumoconiosis. Therefore, for purposes of x-ray determinations alone, it is considered negative for pneumoconiosis.

Drs. Barrett, Sargent and Younes read the 7-15-98 x-ray. Drs. Barrett and Sargent read the film as negative for pneumoconiosis. Dr. Younes read the film as positive for pneumoconiosis. Dr. Younes is a "B" reader. Drs. Barrett and Sargent are both dually qualified. Therefore, I find the 7-15-98 film is negative for pneumoconiosis.

Drs. Mathur and Baker interpreted the 11-18-98 chest x-ray. Dr. Mathur is dually qualified. Both physicians read the film as positive for pneumoconiosis and there is no evidence to contradict this interpretation. I find the 11-18-98 film is positive for pneumoconiosis.

Dr. Broudy was the only physician to interpret the 12-22-98 x-ray. Since Dr. Broudy is a B-reader and his reading has not been contradicted, I find the 12-22-98 is negative for pneumoconiosis.

Drs. Fino, Potter and Mathur interpreted the 8-4-99. Dr. Fino read the film as negative for pneumoconiosis, but Drs. Potter and Mathur read the film as positive. Dr. Potter is neither a "B" reader nor board-certified. Therefore, I give his film interpretation little weight. However, as Dr. Mathur is dually qualified and Dr. Fino is a "B" reader, I accord more weight to Dr. Mathur's interpretation and thus find the 8-4-99 is positive for pneumoconiosis.

The 7-5-00 x-ray was interpreted by Drs. Potter and Fino. Since Dr. Fino is a "B" reader, his interpretation will be given more weight than Dr. Potter's. Therefore, I find the 7-5-00 film to be negative for pneumoconiosis.

Dr. Mathur was the only physician to interpret the last x-ray of record, dated 7-15-00. He read the film as positive for pneumoconiosis, Category 1/1. I accord great weight to this reading as it uncontradicted and was performed by a dually qualified physician. I thus find the 7-15-00 film to be positive for pneumoconiosis.

Based on these findings, there are a total of three x-rays that are positive for pneumoconiosis and nine that are negative for pneumoconiosis. However, as mentioned previously, the five readings by NIOSH are now nineteen years old and thus receive very little weight. Furthermore, with regard to the more recent x-ray films, the length of time between x-ray studies and the qualifications of the

interpreting physicians are factors to be considered. *McMath v. Director, OWCP*, 12 B.L.R. 1-6 (1988); *Pruitt v. Director, OWCP* 7 B.L.R. 1-544 (1984); *Gleza v. Ohio Mining Co.*, 2 B.L.R. 1-436 (1979). The Board has indicated that a seven month time period between x-ray studies is sufficient to apply the "later evidence" rule. *Tokarcik v. Consolidation Coal Co.*, 6 B.L.R. 1-6 (1983). Therefore, I give more weight to Dr. Mathur's interpretation dated 7-15-00 as he has been the only dually qualified physician to interpret a recent chest x-ray for a two year period. In sum, I find the preponderance of the x-ray evidence proves the existence of pneumoconiosis.

(2) Under § 718.202(a)(2), a determination that pneumoconiosis is present may be based, in the case of a living miner, upon biopsy evidence. That method is not available in the instant case because this record contains no biopsy evidence.

(3) Section 718.202(a)(3) provides that pneumoconiosis may be established if any one of several cited presumptions are found to be applicable. In this case, the presumption of § 718.304 does not apply because there is no evidence in the record of complicated pneumoconiosis. Section 718.305 is not applicable to claims filed after January 1, 1982. Finally, the presumption of § 718.306 is applicable only in a survivor's claim filed prior to June 30, 1982. Therefore, Mr. Bentley cannot establish pneumoconiosis under subsection (a)(3).

(4) The fourth and final way in which it is possible to establish the existence of pneumoconiosis under § 718.202 is set forth in subsection (a)(4) which provides in pertinent part:

> A determination of the existence of pneumoconiosis may also be made if a physician, exercising sound medical judgment, notwithstanding a negative x-ray, finds that the miner suffers or suffered from pneumoconiosis as defined in § 718.201. Any such finding shall be based on electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. Such a finding shall be supported by a reasoned medical opinion.

This section requires a weighing of all relevant medical evidence to ascertain whether or not the claimant has established the presence of pneumoconiosis by a preponderance of the evidence. Any finding of pneumoconiosis under § 718.202(a)(4) must be based upon objective medical evidence and also be supported by a reasoned medical opinion. A reasoned opinion is one which contains underlying documentation adequate to support the physician's conclusions. *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19, 1-22 (1987). Proper documentation exists where the physician sets forth the clinical findings, observations, facts, and other data on which he bases his diagnosis. *Oggero v. Director, OWCP*, 7 B.L.R. 1-860 (1985).

Drs. Younes, Baker, Broudy, Potter and Fino opined as to whether or not the Claimant suffers from pneumoconiosis. (DX 11, 24, 25, 33; CX 1; EX 2,3). Drs. Broudy and Fino concluded that Mr. Bentley does not have CWP. Dr. Broudy examined Mr. Bentley in December 1998. He determined

Claimant has mild to moderate chronic obstructive airways disease which he attributed to cigarette smoking. Dr. Broudy based his conclusion on a negative x-ray interpretation, a non-qualifying arterial blood gas study, and a non-qualifying pulmonary function study. He also noted that Mr. Bentley's pulmonary function study improved with bronchodilators. According to Dr. Broudy, "it is feasible ... to distinguish between the pulmonary disability caused by cigarette smoking as opposed to that caused by exposure to coal mine dust." However, Dr Broudy never explained on what basis he believed that coal dust exposure was not a contributing factor to Mr. Bentley's respiratory problem. In the Sixth Circuit, the circuit in which this case arose, a miner's exposure to coal mine employment must merely contribute "at least in part" to his pneumoconiosis. *Cornett v. Benham Coal, Inc.*, ___ F.3d ___, Case No. 99-3469 (6th Cir. Sept. 7, 2000). I find Dr. Broudy's report is not well-reasoned as he never explained his rationale for completely excluding Mr. Bentley's exposure to coal dust as an aggravating factor. *Id.* A medical report is properly discredited where the physician does not explain how underlying documentation supports his or her diagnosis. *Id.*; see also *Waxman v. Pittsburgh & Midway Coal Co.*, 4 B.L.R. 1-601 (1982).

Dr. Fino never examined Mr. Bentley. Instead, he reviewed Mr. Bentley's medical records and concluded that the Claimant is not suffering from pneumoconiosis. Dr. Fino determined that the Claimant does have a mild obstructive abnormality, but he goes on to state that because his condition improves with bronchodilators, the impairment is caused by cigarette smoking because pneumoconiosis is not reversible with the use of bronchodilators. However, as was the case with Dr. Broudy's opinion, Dr. Fino never explained his conclusion that coal dust exposure played *no part* in Claimant's respiratory problems despite the fact that the Claimant worked underground in the mines for over thirty years. Therefore, I give Dr. Fino's medical report less weight.

Drs. Younes, Baker and Potter concluded that Mr. Bentley does suffer from pneumoconiosis. Dr. Younes examined the Claimant in July 1998. Based on the Claimant's working history, smoking history, a chest x-ray, and arterial blood gas study, Dr. Younes diagnosed the Claimant with pneumoconiosis and COPD. Dr. Younes explained that the causes of Claimant's respiratory problems included both coal dust exposure and cigarette smoking. However, Dr. Younes also wrote that the primary etiology was smoking and that dust exposure "may be" a contributing factor. Despite Dr. Younes use of the term "may be," his statements on the CM-988 regarding the diagnosis of pneumoconiosis itself being due to coal dust exposure were unequivocal. Therefore, I find that Dr. Younes did unequivocally determine his first diagnosis was pneumoconiosis due to coal dust exposure with cigarette smoking being a contributing factor. However, I will give his opinion less weight.

Dr. Baker examined Mr. Bentley in November 1998. Based on Claimant's smoking and work histories, his physical examination and a chest x-ray[6], he determined that Claimant was suffering from chronic obstructive airway disease with mild obstructive ventilatory defect and pneumoconiosis. Dr. Baker also noted that Claimant's pulmonary impairment was caused in part by coal dust exposure and in part by cigarette smoking.

Finally, Dr. Potter issued two reports regarding Claimant's condition, one in August 1999, and the other in July 2000. Dr. Potter is Claimant's treating physician. Dr. Potter based his diagnosis of CWP on Claimant's history, pulmonary function studies, and chest-x-rays. Dr. Potter never discussed what role, if any, smoking played in Claimant's respiratory problems. However, Dr. Potter is the treating physician, and more weight may be accorded to the conclusions of a treating physician as he is more likely to be familiar with the miner's condition than a physician who examines him episodically. *Onderko v. Director, OWCP*, 14 B.L.R. 1-2 (1989). I, therefore, accord more weight to Dr. Potter's conclusions.

In conclusion, even if Dr. Younes' use of the phrase "may be a contributing factor" added confusion and was thus accorded less weight, the unequivocal statements of treating physician Potter and examining physician Baker demonstrate those opinions outweigh the single examination of Dr. Broudy. Furthermore, the opinion of Dr. Fino as a non-examining physician is entitled to less weight. Therefore, I find that Mr. Bentley has established pneumoconiosis pursuant to § 718.202(a)(4).

Arising out of Coal Mine Employment:

In order to be eligible for benefits under the Act, a claimant must also prove that pneumoconiosis arose, at least in part, out of his coal mine employment. § 718.203(a). For a miner who suffers from pneumoconiosis and was employed for ten or more years in one or more coal mines, it is presumed that his pneumoconiosis arose out of his coal mine employment. *Id.* As the parties have stipulated that Mr. Bentley has thirty-two years of coal mine employment, I find that his pneumoconiosis arose out of his coal mine employment in accordance with the rebuttable presumption set forth in § 718.203(b).

Total Disability:

If Mr. Bentley is to prevail, he must also demonstrate that he is totally disabled from performing his usual coal mine work or comparable work due to pneumoconiosis pursuant to one of the five

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[6]A judge is not compelled to discredit a physician's opinion that the miner suffers from pneumoconiosis where the physician based his findings, in part, upon x-ray evidence which the judge ultimately concludes did not support a finding of the disease. Church v. Eastern Assoc. Coal Corp., 20 B.L.R. 1-8 (1996); see also Winters v. Director, OWCP, 6 B.L.R. 1-877 (1984)(improper to discredit physician's opinion merely because the underlying x-ray and pulmonary function studies were determined to be outweighed by other studies of record).

standards of § 718.204(c) or the irrebuttable presumption referred to in § 718.204(b). The Board has held that under Section 718.204(c), all relevant probative evidence, both "like" and "unlike" must be weighed together, regardless of the category or type, in the determination of whether the claimant is totally disabled. *Shedlock v. Bethlehem Mines Corp.*, 9 B.L.R. 1-195 (1986); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 B.L.R. 1-231 (1987). A claimant must establish this element of entitlement by a preponderance of the evidence. *Gee v. W.G. Moore & Sons*, 9 B.L.R. 1-4 (1986).

The Sixth Circuit has held that "in order to qualify for benefits under Part 718, a miner, who is found to suffer from pneumoconiosis under § 718.202, must affirmatively establish only that his totally disabling respiratory impairment (as found under § 718.204(c)) was due 'at least in part' to his pneumoconiosis. *Cf*. 20 C.F.R. 718.203(a)." *Adams v. Director, OWCP*, 886 F.2d 818, 825 (6th Cir. 1988).

There is no evidence of complicated pneumoconiosis in the record. Therefore, the irrebuttable presumption of § 718.304 does not apply and total disability cannot be shown under § 718.204(b).

Total disability can be shown under § 718.204(c)(1) if the results of pulmonary function studies are equal to or below the values listed in the regulatory tables found at Appendix B to Part 718. The record consists of five pulmonary function tests, none of which produced qualifying results.

Total disability can be demonstrated under § 718.204(c)(2) by the results of arterial blood gas studies. There are three arterial blood gas studies, none of which produced qualifying results.

Total disability may also be shown under § 718.204(c)(3) if the medical evidence indicates that Claimant suffers from cor pulmonale with right-sided congestive heart failure. There is no medical opinion in the record that Claimant suffers from this condition. Thus, I find that Mr. Bentley has not established total disability under subsection (c)(3).

Section 718.204(c)(4) provides for a finding of total disability if a physician, exercising reasoned medical judgment based on medically acceptable clinical or laboratory diagnostic techniques, concludes that a claimant's respiratory or pulmonary condition prevents him from performing his usual coal mine or comparable work. Mr. Bentley's usual coal mine work took place underground working as an electrician, a cutting machine operator, a mine operator, a roof bolter operator, and making belt moves.

The Board has determined that a physician's opinion need not be phrased in the words of "total disability" provided the assessment elaborates on claimant's impairment in such a way to allow the inference of total disability. *Bueno v. Director, OWCP*, 7 B.L.R. 1-337 (1984). A medical report which describes the severity of the impairment or the physical effect imposed by the respiratory or pulmonary impairment may be sufficient to establish total disability in conjunction with the exertional requirements of claimant's usual coal mine employment. *Budash v. Bethlehem Mines Corp.*, 9 B.L.R.

1-48, 1-104 (1986). However, a medical opinion that merely advises against a return to the dusty atmosphere of a coal mine without addressing the miner's physical capacity to return to work is insufficient to establish the existence of a totally disabling impairment. *Taylor v. Evans & Gambrel Co., Inc.*, 12 B.L.R. 1-83 (1988); *Justice v. Island Creek Coal Co.*, 11 B.L.R. 1-91 (1988).

The opinions of the physicians of record are relevant to the issue of total disability due to pneumoconiosis, and have been discussed in detail, herein. Drs. Fino and Broudy do not believe that the Claimant is totally disabled. However, Dr. Broudy did note that Claimant has a mild to moderate impairment, which is sufficient to find that Claimant is unable to perform the heavy work he was performing at the time he left the mines.

Drs. Younes, Baker and Potter believe that Claimant is unable to return to his usual coal mine employment or comparable work due to his respiratory impairment. Dr. Baker even went so far as to note that Claimant is 100% occupationally disabled from working in the mines or similar dusty occupations. Since their opinions were based on reasoned medical judgment and Dr. Potter is Claimant's treating physician, I find that Mr. Bentley is totally disabled pursuant to § 718.204.

Causation:

The Sixth Circuit requires that total disability be "due at least in part" to pneumoconiosis. *Adams v. Director, OWCP*, 886 F.2d 818, 825 (6th Cir. 1989); *Zimmerman v. Director, OWCP*, 871 F.2d 564, 566 (6th Cir. 1989); *Roberts v. Benefits Review Board*, 822 F.2d 636, 639 (6th Cir. 1987). Pursuant to § 718.204, Claimant has the burden to establish total disability due to pneumoconiosis by a preponderance of the evidence. *Baumgartner v. Director, OWCP*, 9 B.L.R. 1-65, 1-66 (1986); *Gee v. W.G. Moore and Sons*, 9 B.L.R. 1-4 (1986). Medical opinion evidence is the only method available for a claimant to prove total disability due to pneumoconiosis. *See Tucker v. Director, OWCP*, 10 B.L.R. 1-35, 1-41 (1987) (the Board has consistently held that pulmonary function studies and blood gas studies are not diagnostic of the etiology of the respiratory impairment, but are diagnostic only of the severity of the impairment). Medical opinions wherein the physicians did not diagnose claimant as suffering from pneumoconiosis may be accorded little probative value for establishing causation of claimant's total disability. See *Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819 (4th Cir. 1995).

As discussed previously, I have found that Dr. Younes unequivocally found that Claimant suffers from pneumoconiosis due to cigarette smoking and coal dust exposure. Dr. Baker concluded that both coal dust exposure and smoking caused Claimant's respiratory impairment. Dr. Potter concluded that the primary etiology was coal and rock dust exposure. As discussed above, their conclusions are supported by the medical data. In addition, Mr. Bentley's work history (32 years performing underground coal mining work) and moderate smoking history corroborate their conclusions. "Work history is an important diagnostic tool in determining etiology" of a miner's impairment. *Hall v. Consolidation Coal Co.*, 6 B.L.R. 1-1306 (1984). Conversely, Drs. Broudy,

and Fino opined that the origin of Mr. Bentley's condition is from smoking. However, these physicians did not diagnose pneumoconiosis, and, therefore, I assign minimal weight to their medical opinions. *See Hobbs, Supra.* Accordingly, I find that the evidence establishes the requisite nexus between total disability and coal workers' pneumoconiosis.

Entitlement:

As Mr. Bentley has established that he is totally disabled due to pneumoconiosis arising out of coal mine employment, I find that he is entitled to benefits under the Act. Furthermore, pursuant to §725.210, the benefits must be properly augmented on behalf of his wife. Section 725.503(b) provides that:

> [i]n the case of a miner who is totally disabled due to pneumoconiosis, benefits are payable to such miner beginning with the month of onset of total disability. Where evidence does not establish the month of onset, benefits shall be payable to such miner beginning with the month during which the claim was filed. . . .

In July 1998, Dr. Younes noted that Claimant did not have the respiratory capacity to perform the work of coal miner or comparable work in a dust free environment. In November 1998, Dr. Baker noted that Claimant was 100% disabled from working in the mines and similar dusty occupations. Dr. Potter, in August 1999, found that Claimant was impaired from performing his usual coal mine work or comparable work in a dust-free environment. Based on this evidence, I cannot determine the exact date of onset of total disability. Therefore, benefits must be payable commencing with the month during which the claim was filed. William Bentley filed his claim on June 29, 1998. As such, I find that June 1998 is the proper onset date and Mr. Leslie and his wife are entitled to benefits commencing as of this date.

Attorney's Fees:

No award of attorney's fees for services to Mr. Bentley is made herein, since no application has been received from counsel. A period of 30 days is hereby allowed for Mr. Bentley's counsel to submit an application, with a service sheet showing that service has been made upon all parties, including Claimant. The Parties have 10 days following receipt of any such application within which to file their objections. The Act prohibits the charging of any fee in the absence of such approval. *See*, §§ 725.365 and 725.366.

ORDER

It is therefore ORDERED that the claim of William Bentley for benefits under the Act is GRANTED. Benefits are hereby ORDERED to be paid from Torie Mining Inc. to William and Inez Bentley beginning with the date of June 1, 1998.

THOMAS F. PHALEN, JR.
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within 30 days from the date of this decision, by filing notice of appeal with the Benefits Review Board, P.O. Box 37601, Washington, D.C. 20013- 7601. **A copy of a notice of appeal must also be served on Donald S. Shire, Esquire, Associate Solicitor for Black Lung Benefits, Frances Perkins Building, Room N-2117, 200 Constitution Avenue, NW, Washington, D.C. 20210.**